Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-204

THOMAS B. DELASHAW, III,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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THE SUPERIOR COURT OF THE
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Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment herein of the California Supreme Court entered in the above-entitled case on May 8, 1975.

OPINION BELOW

Petitioner's request for review of the decision of the Superior Court of the

State of California, for the County of Los Angeles, was denied by the Court of Appeal, Second Appellate District, State of California, and by the California Supreme Court without benefit of a hearing. Both courts refused to review an order of the Superior Court compelling petitioner to answer certain questions orally and to produce certain documents. The order of the Superior Court is appended herein.

JURISDICTION

The dismissal of the petition for hearing by the California Supreme Court was entered on May 8, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Does the Fifth Amendment privilege against self-incrimination apply with full force to questions asked during pre-trial civil discovery proceeding?

2. Should a witness at a pre-trial civil discovery proceeding be deemed to have waived his privilege against

self-incrimination by admitting an affiliation with a particular business entity?

3. Should a witness at a pre-trial civil discovery proceeding be deemed to have waived his privilege against self-incrimination by answering in good faith questions which seek non-incriminatory information?

4. Do prior statements made to an agent of the Federal Bureau of Investigation by a witness at a pre-trial civil discovery proceeding constitute a waiver of the witness' privilege against self-incrimination?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

STATEMENT OF THE CASE

In a cross-complaint filed November 13, 1973, Real Party in Interest Home Savings and Loan Association seeks to

recover the principal sum of $300,000.00 plus interest and attorney's fees from Real Party in Interest Houston General Insurance Company by reason of a financial guaranty bond which it alleges was executed and delivered to it as partial security in connection with a real estate transaction in which it sold certain real property commonly known as the "Lido Apartment" to Real Party in Interest Marina West Insurance, Inc. for the sum of $1,200,000.00. Said obligation was evidenced by promissory notes in the sum of $900,000.00 and $300,000.00, secured by deeds of trust executed by Marina West Insurance, Inc. in favor of Home Savings and Loan Association and by the said financial guaranty bond. Houston General Insurance Company has denied any liability to Home Savings and Loan Association by reason of the said bond, and has asserted various affirmative defenses including that the purported bond was not executed by any authorized agent or employee of Houston, that the purported signature of Mr. James Schrader (Houston's underwriter) to the said bond is a forgery and that Home should be estopped

from recovering any judgment in the within action by reason of its alleged conspiracy with petitioner, Marina West Insurance, Inc. and Ralph Eidem to defraud Houston General Insurance Company by issuing or causing to be issued the said bond without the knowledge or consent of Houston General Insurance Company.

Houston General Insurance Company also filed a cross-complaint herein against petitioner and others seeking to have the bond cancelled; to recover damages for fraud; damages for the alleged negligence of James Schrader, and a judgment that Marina West Insurance, Inc. is in truth and in fact the alter ego of petitioner and Ralph Eidem. In answer to said cross-complaint, Home Savings and Loan Association alleges in part that if a fraud or conspiracy was committed it was a fraud and conspiracy committed by Marina West Insurance, Inc., petitioner, Ralph Eidem, James Schrader and others who had received actual and ostensible authority from Houston General Insurance Company and that accordingly any loss caused by the alleged fraud should therefore fall upon

Houston General Insurance Company.

In his verified answer to the verified cross-complaint filed herein as required by California Code of Civil Procedure §446, petitioner denies among other things that there was a fraudulent conspiracy to obtain the bond, denies concealing that the real property had been sold and repossessed on numerous occasions, denied concealing that the bond had been executed and delivered without the knowledge and consent of cross-complainant, denies concealing that cross-complainant received no security or other consideration for the bond, denies that the bond was fraudulently executed and delivered to Home Savings and Loan Association, and denies entering into a conspiracy to induce cross-defendant, James Schrader to breach his contract of employment with cross-complainant.

On or about April 9, 1974 and April 10, 1974, the deposition of petitioner was taken. During his deposition, petitioner answered all questions regarding background information and other

non-incriminating data and then refused to answer any questions regarding the Lido Apartments transaction, asserting his Fifth Amendment rights as the basis for his refusal to answer.

On May 17, 1974, Houston General Insurance Company moved the Superior Court for an order compelling petitioner to answer and to produce the documents. On July 19, 1974, after submission by counsel, Judge Goebel of the Superior Court granted the motion and ordered petitioner to answer all of the 191 questions propounded and produce the requested documents. Petitioner filed an application for stay and petition for alternative Writ of Mandate and/or Prohibition and/or Certiorari with the Court of Appeal, Second Appellate District, State of California, on or about February 20, 1974. The Court of Appeal summarily denied the petition on April 6, 1975, without hearing. Petition for Hearing in the California Supreme Court was filed on April 17, 1975, and summarily denied on May 8, 1975.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO REVIEW THE RULING OF THE COURT BELOW TO THE EFFECT THAT THE PRIVILEGE AGAINST SELF-INCRIMINATION AS GUARANTEED BY THE FIFTH AMENDMENT WAS NOT AVAILABLE TO PETITIONER IN A PRE-TRIAL CIVIL DISCOVERY PROCEEDING, SINCE IN SO HOLDING, THE COURT VIOLATED PETITIONER'S RIGHT TO EXECUTE HIS PRIVILEGE IN SUCH A PROCEEDING

Past decisions of this Court have made it clear that the privilege against self-incrimination guaranteed by the Fifth Amendment extends broadly into civil law proceedings as well as criminal law proceedings. Counselman v. Hitchcock, 142 U.S. 547 (1892), McCarthy v. Arndstein, 266 U.S. 34 (1924), Lefkowitz v. Turley, 414 U.S. 70 (1973). In addition, since the Court's decision in Malloy v. Hogan, 378 U.S. 1 (1964), and its companion case of Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964), the applicability of the privilege in State proceedings has not

been questioned. Still, some courts have been reluctant to recognize the existence of the privilege in pre-trial civil discovery proceedings. The rationales offered for such decisions commonly are either that the witness in a civil proceeding has made an insufficient showing that his testimony will tend to be incriminating or that there is a likelihood of prosecution as a result of his testimony, or that the witness has waived his right to claim the privilege. The uneven application of the Fifth Amendment privilege in such cases begs a definitive statement from this Court as to the precise scope of the privilege.

In the case at bar, petitioner, during the taking of his deposition, invoked the Fifth Amendment privilege against self-incrimination in response to 191 questions related generally to five subject area:

(1) Petitioner's personal financial transactions since January 1, 1972;

(2) The dates of the petitioner's involvement with Marina West

Insurance, Inc., since July 20, 1972;

(3) Petitioner's involvement with other business entities since July 20, 1972;

(4) Documents prepared by petitioner or possessed by him on certain occasions or at certain points in time;

(5) Petitioner's involvement in business deals with specific named individuals and business entities.

In his ruling of July 19, 1974, Judge Goebel of the Superior Court pursuant to motion ordered petitioner to answer each and every one of the 191 questions which he refused to answer during the course of his deposition. In all but 13 instances, Judge Goebel ruled that there was no privilege or that there was an insufficient showing of privilege by petitioner. Yet, it is apparent from the nature of each of the 191 questions asked that the information sought to be elicited from petitioner could form a "link in the

chain" of evidence which could "possibly tend to incriminate." Hoffman v. United States, 341 U.S. 479 (1951). When the questions standing alone are placed in the context in which they are asked, it is even clearer that his answers could possibly tend to incriminate him. The questions were posed by counsel for a cross-complainant which has alleged the commission of fraudulent acts. The fraudulent acts complained of, if true, could also be the subject of criminal prosecutions for violations of various state laws, to wit, California Penal Code §§ 118, 118a, 127, 133, 135, 153, 154, 155, 182, 470, 471, 475, 475a, 476, 476a, 484, 484b, 487, 492, 494, 496, 497, 503, 504b, 506, 506b, 507, 508, 529, 530, 531a, 532, 532a, 532c, 533, 536, 536a, 548, 560, 560.1, 560.2 and 560.3. Also, due to the interstate nature of the business transactions involved, there could be possible violations of various federal statutes, a statement supported by the fact that offices of the Federal Bureau of Investigation and the Internal Revenue Service in Los Angeles have been investigating petitioner's business transactions.

Petitioner submits that he has clearly demonstrated the existence of an incriminatory hazard and should the ruling of the Superior Court which denies his privilege against self-incrimination be allowed to stand in this instance, it will place petitioner in the impossible position of choosing either to testify and risk possible self-incrimination or to refuse to do so and suffer civil contempt. Refusal by this Court to correct this situation will leave petitioner with no other alternative, and will effectively strip him of his constitutional right as guaranteed by the Fifth Amendment.

Certiorari should be granted to resolve the conflicting applications of the privilege against self-incrimination by lower state and federal courts and to affirm that the privilege is available to witnesses in pre-trial civil discovery proceedings.

II

CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING OF THE COURT BELOW TO THE EFFECT THAT PETITIONER WAIVED HIS RIGHT AGAINST SELF-INCRIMINATION, SINCE IN SO HOLDING, THE COURT FAILED TO RECOGNIZE THAT ONE DOES NOT WAIVE THE PRIVILEGE ONLY BY ADMITTING AN AFFILIATION WITH A PARTICULAR BUSINESS ENTITY

In the 191 items involving assertions of the privilege against self-incrimination at his deposition, petitioner was found by the Superior Court to have waived the privilege in regard to eleven items and possibly two others. Of these, three items concern petitioner's refusal to answer questions concerning the date when he ceased to be affiliated with Marina West Insurance, Inc. as an officer and director. In ordering petitioner to answer the questions, the Superior Court offered the following reasons: "Not privileged; waived," and "Waived by previous answer."

The leading case establishing the standard for waiver is Johnson v. Zerbst, 304 U.S. 458 (1938). There, this Court

held that there must be an "intentional relinquishment or abandonment of a known right" before a waiver will be found (supra, at 464). The Johnson case required that three criteria be met in order for a waiver to be effective, namely that the waiver be voluntarily, intelligently and knowingly made. This standard has been reaffirmed and applied in recent decisions by this Court. See, e.g., Brady v. United States, 397 U.S. 742, 748 (1970), D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187 (1971), and Fuentes v. Shevin, 407 U.S. 67, 94 (1972).

Application of the standard of waiver has been uneven. In Arndstein v. McCarthy, 254 U.S. 71 (1920) this Court seemed to require virtual admission of the elements of a crime before the privilege could be waived. Later, in Rogers v. United States, 340 U.S. 367 (1951) and Brown v. United States, 356 U.S. 148 (1958), this Court narrowed the restrictions on finding a waiver. Both cases involved a witness' admission of affiliation with the Communist Party, and could be interpreted to mean that a witness waives the

privilege with respect to the details of any facts about which he voluntarily testifies, if such facts are in themselves incriminatory.

Other cases, however, seem not to go as far as Rogers and Brown in certain respects. For example, in Smith v. United States, 337 U.S. 137 (1949), a witness was called to testify before an examiner of the Office of Price Administration concerning his alleged violations of price control regulations. Although the Emergency Price Control Act granted him immunity from prosecution for statements voluntarily made to the examiner, a federal court held that he had waived any claim to immunity by failing to assert it at the examination, even though he claimed the privilege against self-incrimination at that examination. The Supreme Court unanimously held that the witness obtained immunity by testifying and that he had not lost his privilege against self-incrimination, stating that waiver of the privilege "is not lightly to be inferred." Smith, supra, 337 U.S. 137 at 150. In Blau v. United States, 340 U.S. 159 (1950), the

Supreme Court unanimously held that a witness called to testify before a grand jury was entitled to claim the privilege against self-incrimination when asked questions concerning her membership in the Communist Party of Colorado. In Emspak v. United States, 349 U.S. 190 (1954), the Court held that a witness before a congressional committee had not, after making a general claim or privilege, waived the privilege as to a particular question by answering in the negative an inquiry as to whether his refusal to answer that question was based upon his belief that an answer would subject him to criminal prosecution. The Court, in Emspak concluded that waiver of the privilege could not be based upon vague, uncertain or equivocal evidence. The foregoing three cases each dealt with the manner in which the privilege was claimed by a witness, not with testimony by a witness which may be sufficiently incriminating to constitute a waiver. Nevertheless, the Court in each case expressed concern about whether a technical deficiency or momentary lapse could later be viewed as a waiver. This concern about

the consequences of a strict application of the waiver doctrine has been mirrored in lower federal court decisions.

In Grudin v. United States, 198 F.2d 610 (9th Cir. 1952), an admission by a defendant that he had written a non-incriminating letter relating to an automobile and to sending certain pink and white slips and to the expectation that he received a check, was held by the U.S. Court of Appeals for the Ninth Circuit not to constitute a waiver of his immunity from answering incriminating questions about later transactions involving the automobile or the pink and white slips or the check.

In the case at bar, although one cannot be certain what led the Superior Court to reach its conclusion with regard to the three items mentioned above, possibly the court felt that petitioner had waived the privilege in regard to the date of his termination from Marina West by testifying about the date of his affiliation with said corporation. This reasoning ignores the fact that affiliation with an organization is not per se incriminating

especially if no unlawful activities had allegedly occurred at that date. However, if unlawful activities occurred after that date, the date of termination may become "a link in a chain of facts" tending to incriminate, since affiliation with the corporation at the time certain alleged unlawful activities occurred may give rise to an inference that a director or officer had knowledge about or participated in such unlawful activities. To reach the conclusion that petitioner waived the privilege in this instance by testifying to the date of affiliation, the Superior Court was required to extend both Rogers, supra, and Brown, supra, beyond their confines. These two decisions mark the outer extreme on disclosure of affiliation with an organization, since to go further is to impinge on freedom of association guaranteed by the First Amendment. See NAACP v. Alabama, 357 U.S. 449 (1958); Shelton v. Tucker, 364 U.S. 479 (1960); Healy v. James, 408 U.S. 169 (1972). Thus, while membership in the Communist Party may constitute a link in a chain of facts tending to incriminate, mere

affiliation with a lawfully-organized corporation can hardly constitute such a link. Thus, the admission of affiliation by petitioner with Marina West cannot by itself constitute a waiver of the privilege against self-incrimination.

As the reasons given by the Superior Court for its order indicate, the court was uncertain whether the answer to the question regarding the date of termination of petitioner from Marina West would have any tendency to incriminate. Given this uncertainty, the lower court could not reasonably conclude at the same time that petitioner waived the privilege by testifying about the date of his affiliation with Marina West. Since the date of his affiliation with Marina West was not in itself incriminating, petitioner could not properly invoke the privilege until asked about the date of his alleged termination from Marina West. Even then, the date of termination is not in itself an incriminating fact, but could be a possible link in the chain of facts tending to incriminate. If the privilege could not be relied upon prior to the

time that he was asked about the date of termination, it is impossible that petitioner could have waived the privilege by testifying at an earlier point about the date of his affiliation with Marina West. Under the circumstances, petitioner could not have been deemed to have waived his privilege against self-incriminating by admitting his affiliation with Marina West.

III

CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING OF THE COURT BELOW TO THE EFFECT THAT PETITIONER WAIVED HIS PRIVILEGE AGAINST SELF-INCRIMINATION, SINCE IN SO HOLDING, THE COURT FAILED TO RECOGNIZE THAT ONE DOES NOT WAIVE THE PRIVILEGE BY ANSWERING IN GOOD FAITH THOSE QUESTIONS WHICH SEEK NON-INCRIMINATORY INFORMATION

Of the 13 items of the deposition where the Superior Court found that the privilege had been waived, ten items involved questions which called for information concerning certain financial transactions in which petitioner had engaged, including repayment of personal loans, the obtaining of additional loans,

payments made from the Lido Account of Marina West Insurance, Inc., payment of funds from regular accounts of Marina West Insurance, Inc. for non-business-related purposes, and payments to cross-defendant James Schrader. In the case of each of these items, petitioner initially testified about obtaining loans in general or about making payments in general from established corporate accounts. Although the Superior Court did not specifically state its reasons for finding waivers in the case of these ten items, it may be that the court determined that petitioner's testimony concerning his practices and procedures in general constituted a waiver of the privilege where details of specific transactions were sought. Again, such reasoning reflects an interpretation of Rogers v. United States, supra, and Brown v. United States, supra, which is not supported by case law.

Although the court, rather than the witness, clearly has the last word in determining whether the privilege exists or whether it has been waived, courts have nevertheless tended to show great

deference to the claim of the witness. See, e.g., Ullman v. United States, 350 U.S. 422 (1955), Shendal v. United States, 312 F.2d 564 (9th Cir. 1963), In Re Levinson, 219 F. Supp. 589 (S.D. Cal. 1963). These cases accept as fundamental the fact that only the witness can know when testimony will incriminate or not incriminate him. If a witness is deemed to have waived the privilege each time he testifies about a non-incriminating set of facts, which is related to a subsequent incriminating set of facts, then the protection afforded by the privilege against self-incrimination is meaningless.

In most cases, courts have had a tendency to uphold the privilege rather than find a waiver where a witness testifies about part but not all of a transaction. (See, Grudin v. United States, supra.) In the instant case, as in Grudin, petitioner invoked the privilege on two items which dealt with repayment of loans by petitioner and his co-defendant Ralph Eidem. Although petitioner testified that he had received a loan to help finance the establishment of Marina West Insurance,

Inc. this fact was not incriminating, whereas the two items for which the privilege was invoked sought information concerning repayment of loans by petitioner and Ralph Eidem, which could possibly tend to incriminate petitioner. Similarly, petitioner testified that he had received a loan from his father, but asserted the privilege when asked about loans received from others during a specific time period. While the fact of the loan from his father was non-incriminating, the fact of the loan from others could possibly tend to incriminate him.

In Kiewel v. United States, 204 F.2d 1 (8th Cir. 1953), a corporation president was permitted to assert the privilege when asked by a Grand Jury about payments made to him by certain corporate accounts. In the instant case, petitioner asserted the privilege on items dealing with expenditures made by him involving the Lido Account. He also asserted the privilege when questioned concerning payments made from regular corporate accounts for non-business purposes. Finally, he claimed the privilege when asked whether Marina

West had ever issued a check to cross-defendant James Schrader. Petitioner testified at length concerning the general accounting system of Marina West Insurance, Inc., including his individual supervision of the operating, payroll and trust accounts. This testimony concerned non-incriminating facts, whereas the items in question sought information concerning the special Lido Account, expenditures for non-business-related purposes, and payments made to a single individual, all of which could possibly tend to incriminate petitioner. As in Kiewel, supra, petitioner should be permitted to refuse to answer questions concerning payments from corporate accounts which would tend to incriminate him. In making a good attempt to answer those questions which sought non-incriminating information, petitioner chose a point beyond which he felt he could not go without incriminating himself. The witness' decision should be respected and he should not be required to answer the questions referred to in the order of the Superior Court dated July 19, 1974.

Certiorari should be granted because the ruling of the Court below is in conflict with past decisions of this and lower Courts regarding waiver of the privilege against self-incrimination and has violated petitioner's right to invoke the privilege.

IV

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER OR NOT PRIOR STATEMENTS MADE TO AN AGENT OF THE FEDERAL BUREAU OF INVESTIGATION BY A WITNESS AT A PRE-TRIAL CIVIL DISCOVERY PROCEEDING CONSTITUTE A WAIVER OF THE WITNESS' PRIVILEGE AGAINST SELF-INCRIMINATION

During the course of his deposition, petitioner testified that he had met with Mr. Holmes of the Federal Bureau of Investigation in May, 1973, at the Federal Building on Wilshire Boulevard, in Los Angeles. Petitioner refused to answer questions concerning the subject matter of his discussions with Mr. Holmes, including any conversations relating to the subject matter of the instant case. Although counsel for co-defendant and

cross-complainant Houston General Insurance Company argued at the time of the deposition that petitioner had waived the privilege with regard to these communications with Mr. Holmes, the Superior Court reasoned somehow that the communications were "not privileged." Although the court did not state that it based its reasoning upon a finding of waiver it may have reached such a result.

It is a universal rule that a waiver is effective only in the proceeding in which the person testifies. Hence, an individual may claim his privilege at a criminal trial after waiving it at the preliminary examination or before the Grand Jury. Overend v. Superior Court, 131 Cal. 280, 63 Pac. 372 (1900); In re Sales, 134 Cal.App. 54, 24 P.2d 916 (1933). At least one U.S. Circuit Court has held specifically that a defendant who voluntarily makes statements to an agent of the Federal Bureau of Investigation does not waive the privilege against self-incrimination when called to testify before a Grand Jury. United States v. Miranti, 253 F.2d 135 (2nd Cir. 1958).

It is submitted that any statements made to Mr. Holmes, do not constitute a waiver of the privilege against self-incrimination in a later deposition in a civil case. The only issue to be resolved therefore is whether petitioner had reason to invoke the privilege with respect to those conversations. As indicated supra, those conversations, if divulged, could reveal facts which could form "a link in a chain of facts" tending to incriminate petitioner. Thus, assertion of the privilege with regard to those conversations was clearly appropriate under the circumstances, contrary to the reasons set forth by the Superior Court for its order. Similarly, the privilege could not be waived by the mere revealing of the occurrence of conversations which took place during a prior proceeding.

This Court should grant certiorari to settle the issue of whether or not prior statements made to an agent of the Federal Bureau of Investigation by a witness in a civil proceeding constitute a waiver of the witness' privilege against self-incrimination.

CONCLUSION

Petitioner, for the reasons aforesaid, has been denied his Fifth Amendment privilege against self-incrimination. He has been unable to present his case at hearing in the Appellate Courts of California. He finds himself accordingly in the impossible position of having lost his constitutional guarantees and choosing either to testify and possibly incriminate himself or not to testify and suffer civil contempt. It is respectfully prayed that a writ of certiorari be granted to review the judgment of the Courts below.

Respectfully submitted,

ARTHUR W. FRANCIS, JR.
JONES & WILSON

Attorneys for Petitioner

APPENDIX

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAY 8 - 1975

I have this day filed Order

HEARING DENIED

In re: 2 Civ. *No.* 45829

Delashaw

vs.

Superior Court, Los Angeles

Respectfully,

G. E. BISHEL
Clerk

81414-877 2-74 SM OSP

BEST COPY AVAILABLE